BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAWRENCE ESPINOSA
Claimant
VS.

NATIONAL CO-OP REFINERY ASSOCIATION
Respondent
AND

AMERICAN INTERNATIONAL INSURANCE CO.
Insurance Carrier
AND

TRAVELERS INSURANCE COMPANY
Insurance Carrier
AND

KANSAS WORKERS COMPENSATION FUND

Docket No. 158,815 and 159,107

ORDER

ON the 18th day of November, 1993, the application of the respondent for review by the Workers Compensation Appeals Board of the Order entered herein by Administrative Law Judge George R. Robertson, on October 26, 1993, came regularly on for oral argument by telephone conference.

APPEARANCES

Claimant appeared by and through his attorney, Mark S. Gunnison, Overland Park, Kansas. Respondent and American International Insurance Company appeared by and through their attorney, James A. Cline, Wichita, Kansas. Travelers Insurance Company appeared by and through its attorney, Jess W. Arbuckle, Hutchinson, Kansas. The Kansas Workers Compensation Fund appeared by and through its attorney, Norman R. Kelly, Salina, Kansas. There were no other appearances.

RECORD

The record is herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge.

STIPULATIONS

The stipulations are herein adopted by the Appeals Board as specifically set forth in the award of the Administrative Law Judge.

ISSUES

Docket No. 158,815

The remaining issues are:

(1) What is the nature and extent of claimant's disability, if any?

(2) Is claimant entitled to future medical benefits?

(3) What is the average weekly wage?

(4) What is the contribution or liability of the Kansas Workers Compensation Fund, if any?

Docket No. 159,107

The remaining issues are:

(1) What is the nature and extent of claimant's disability, if any?

(2) Did the claimant timely serve a written claim?

(3) Is claimant entitled to future medical benefits?

(4) What is the average weekly wage?

(5) What is the contribution or liability of the Kansas Workers Compensation Fund, if any?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Docket No. 159,107

Claimant was injured while in the course of his employment on January 5, 1989, while lifting a clutch on an oil field engine. He felt a sharp pain in his low back and to the right side of the low back.

He continued working and later that day reported the accident to his supervisor. An internal "Preliminary Accident Report" was prepared by the employer and signed by the employee on or within one week of the date of accident.

Medical treatment was authorized and claimant was referred to Dr. Lary Hill, a board certified family practice physician in Great Bend, Kansas.

Dr. Hill first saw claimant at his office on January 6, 1989. He diagnosed a low back strain, prescribed aspirin and physical therapy. Dr. Hill did not take claimant off work at that time because the claimant wanted to continue working.

When Dr. Hill next saw claimant on January 16, 1989, he was continuing to have complaints and therefore the doctor took him off work at that time.

Dr. Hill subsequently ordered an MRI which showed spondylolysis and spondylolisthesis of L5-S1, disc space narrowing, degeneration, and osteophytosis but no disc bulging or herniation. This MRI was consistent with a preexisting degenerative condition and spondylolisthesis as testified to by the subsequent examining physician, Dr. C. Reiff Brown, and as evidenced by the Form 88 filed September 8, 1978, with the Kansas Division of Workers Compensation.

Claimant continued with physical therapy from January 6, 1989, until March 3, 1989. The discharge records of the physical therapist, Mark Schukman, determined that the claimant was able to function at the heavy-work level with lifting capabilities of up to 100 pounds infrequently and 50 pounds frequently.

Dr. Hill last saw the claimant for this injury on March 6, 1989, at which time he released him to return to work without restrictions. Dr. Hill was mindful of the fact that claimant's job required him to perform lifting in the very-heavy category in excess of the limits recommended by the physical therapist. Although Dr. Hill was inclined to restrict claimant from very heavy lifting he did not do so at the claimant's request because the claimant was concerned about losing his job if he could not perform all of the job requirements.

Claimant testified that the employer did, nevertheless, accommodate him upon his return to work by installing a boom on his truck to assist with heavy lifting and also by providing him with an assistant that would go with him on jobs that would require heavy lifting.

Claimant continued to perform his regular job duties from March, 1989, until January 30, 1990. During this period he experienced back pain which was aggravated by activity but did not feel a need to again seek medical treatment.

Docket No. 158,815

Claimant suffered a second accidental injury while in the course of his employment on January 30, 1990, when cranking an engine and felt something tear in his right inguinal area or groin and simultaneously experienced severe pain in his low back.

Claimant described this re-injury of his low back as being in the same area as his prior injury but with increased pain which was constant and did not respond to conservative treatment to the extent that his prior injury did.

Claimant continued working from this date of accident and up until February 14, 1990, when he was again referred by his employer to Dr. Lary Hill for authorized medical treatment.

Dr. Hill checked for an inguinal hernia but could not find any and so felt that the claimant had aggravated his degenerative disc and strained his lower abdominal muscles on the right.

Dr. Hill again prescribed physical therapy and an anti-inflammatory medication.

Claimant again received physical therapy from Mark Schukman from February 20, 1990, until April 9, 1990.

Since the claimant was not responding satisfactorily to the physical therapy Dr. Hill referred claimant to a board certified orthopedic surgeon, Dr. C. Reiff Brown. He was also referred to a Dr. Kirby and thereafter to a Dr. Kenneth Hollis for opinions at to a possible hernia. Dr. Hill referred claimant to Dr. Brown on April 24, 1990. Thereafter, Dr. Brown provided the primary care for the claimant's low back condition. The referral to Dr. Hollis was made on June 8, 1990, by Dr. Hill and thereafter, Dr. Hollis provided the primary care for the claimant's hernia although Dr. Hill did see claimant again, for the last time, on July 17, 1990, at the recommendation of Dr. Hollis, for a flexible procto examination procedure. That procedure did disclose a large polyp which was a condition unrelated to the employment.

Dr. Brown first saw the claimant on May 8, 1990, and continued to treat him conservatively until September 19, 1990, at which time he rated claimant as possessing an 18 percent functional impairment to the body as a whole and released him from further medical treatment to return to work with a lifting restriction of less than 100 pounds occasionally and less than 50 pounds frequently.

Dr. Hollis first saw the claimant on June 13, 1990. He diagnosed a probable right inguinal hernia which he related to the work injury incident in 1990, which claimant described turning a crank and felt a pop or tear in the right groin area. Surgery was performed for a direct right inguinal hernia on November 6, 1990, following which the claimant was off work for six weeks. Dr. Hollis last saw the claimant on December 12, 1990, and released claimant following that office visit to return to work without restrictions relative to the hernia.

Dr. Brown was the only physician that gave an opinion concerning the claimant's functional impairment rating and permanent restrictions. He did not examine the claimant until after the second accident of January 30, 1990. He apparently did not have the records of Dr. Hill and because his records only related a history of injury on January 5, 1989, he initially attributed the entire functional impairment and resulting physical restrictions to that accident date. However, when presented with a hypothetical question asking him to assume facts consistent with the second accident of January 30, 1990, Dr. Brown was of the opinion that the second accident was a permanent aggravation of the low back condition and that his opinion as to functional impairment and restrictions would be as of the date he examined the claimant and, thus, would be inclusive of the second injury.

Dr. Brown conceded that the claimant probably did have some permanent impairment from the first injury on January 5, 1989, but he was not asked nor did he apportion his rating as between the two accidents.

Dr. Brown was of the opinion that "but for" the January 5, 1989 injury, and the preexisting spondylolisthesis the January 30, 1990 accident and resulting disability would not have occurred.

Docket No. 158,815

The Appeals Board has examined the record as a whole and finds in Docket No. 158,815, that the injury of January 30, 1990, caused or significantly aggravated the hernia condition and that the respondent and insurance carrier in that docket number are responsible for the hernia and its treatment.

The Appeals Board finds that the testimony of the treating physicians is such that the hernia may have preexisted the January 30, 1990 incident, but that there was no knowledge either by the claimant, the employer, nor for that matter by the treating physicians of a hernia prior to January 30, 1990, and that the condition did not become treatable until the incident of January 30, 1990.

Therefore, the respondent and insurance carrier, Travelers Insurance Company, in Docket No. 158,815 shall be responsible for any and all treatment regarding the hernia together with six weeks of temporary total disability compensation for the period of time claimant was off work for this condition. There is no liability of the Kansas Workers Compensation Fund pursuant to K.S.A. 44-567 for the hernia condition.

The Appeals Board finds that the claimant suffered an 18 percent permanent partial disability to the body as a whole as a result of the January 30, 1990 injury. The Board further finds that "but for" the preexisting spondylolisthesis and the injury of January 5, 1989, as to both of which the employer has shown knowledge and handicap, the injury and resulting disability would not have occurred or the disability would not have been as great. Therefore, 100 percent of the liability for this claim as to the back is the responsibility of the Kansas Workers Compensation Fund.

There is no showing as to any apportionment of the disability as between the two accidents and docketed claims. Consequently a credit cannot be computed and, therefore, the Fund has failed in its burden to establish any entitlement to a credit.

WAGE

The remaining issue is: What is the average weekly wage? The Appeals Board has considered the arguments of claimant and the arguments of the respondent and Fund. The Board finds that the average weekly wage shall include the fringe benefits that were in effect on January 30, 1990.

Respondent argues that the claimant is not entitled to the additional compensation because it was not discontinued as a result of the injury but instead was discontinued solely because of the sale of the company to a new employer which simply discontinued or changed the fringe benefits available to its workers.

The Appeals Board is persuaded by the arguments of claimant to the effect that K.S.A. 44-511(a)(2) does not condition the inclusion of such "additional compensation" upon their having been discontinued due to the injury. In fact the legislative history suggests a contrary intent by the elimination of that language from the statute. Accordingly, claimant would be entitled to the addition of the value of the fringe benefits as of the date of their discontinuance which is shown in the record to have been January 1, 1991, at the latest.

WRITTEN CLAIM

Respondent denies that written claim for compensation was timely received for the accident of January 5, 1989, Docket No. 159,107. The claimant argues that the exhibits introduced at regular hearing, including the "NCRA Preliminary Accident Report," and the absentee report satisfy the written claim requirement under K.S.A. 44-520a. Both the claimant and the respondent cite Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973) in support of their respective positions. Claimant correctly points out that the Kansas Supreme Court held in that case that a written claim need not take any particular form so long as it is a claim. The respondent counters that claimant has not satisfied his burden of proving an intent to claim compensation by virtue of either the preliminary accident report which was prepared by the employer and signed by the claimant or the absentee form likewise prepared by the employer.

"The purpose of the requirement for a written claim is to enable the employer to know about the injury in time to investigate it." Pyeatt v. Roadway Express, Inc., 243 Kan. 200, Syl. ¶ 3, 756 P.2d 438 (1988), citing Craig v. Electrolux Corporation, 212 Kan. 75, 82, 510 P.2d 138 (1973). As the Supreme Court stated in Pyeatt, "This is not a case where the employer had no notice of Pyeatt's accidents or lacked knowledge that Pyeatt's claim for compensation was for the January accident and the March aggravation of the injury." Id. at 205. Here the employer authorized medical treatment and paid temporary total disability compensation thereby evidencing its knowledge of the accident, and that it was allegedly work related.

Clearly here, as in Pyeatt, the employer was not prejudiced. The Appeals Board does not intend to limit the timely written claim requirement to a showing of prejudice as we would consider such to be too restrictive an interpretation of the written claim requirement and of the Supreme Court's decision in Pyeatt. In that case the totality of the facts and circumstances were taken into consideration both as to what would be required to constitute a written claim and the effect such document or writing could reasonably be expected to be given by the employer. In the case at bar, there is the added consideration that the claimant did resume to authorized medical treatment within one year of the date compensation benefits were last provided by the employer following the January 5, 1989 accident. K.S.A. 44-557(c). That is, on February 14, 1990, the claimant returned to Dr. Lary Hill. Of course this visit to Dr. Hill was precipitated by the January 30, 1990 accident which aggravated the preexisting back condition. Arguably the claimant would not have returned to medical treatment absent the aggravation. However, to suggest that this treatment was unrelated to the initial injury would not be correct. The medical, legal and factual confusion and questions that have been raised in the record of this case as to whether we are dealing with one accident or two supports a conclusion that the treatment was for both and for purposes of timely written claim, we will not impose upon the claimant under the facts and circumstances of this case the responsibility of determining which injury date caused him to again need medical treatment in February of 1990. Accordingly, for the reasons discussed and under the totality of the facts and circumstances of this case, we find that the claimant did satisfy the statutory requirement for timely written claim in both docketed claims.

AWARD

Docket No. 158,815

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Lawrence Espinosa, and against the respondent, National Co-op Refinery Association, and the insurance carrier, Travelers Insurance Company and the Kansas Workers Compensation Fund.

The claimant is entitled to six weeks temporary total disability at the rate of $271.00 per week or $1,626.00 and 41 weeks permanent partial disability compensation at $67.21 per week or $2,755.61 followed by 368 weeks at $74.79 per week or $27,522.72 for an 18 percent permanent partial general body disability making a total award of $31,904.33.

As of December 17, 1993, there would be due and owing to the claimant six weeks temporary total compensation at $271.00 per week in the sum of $1,626.00 and 41 weeks permanent partial disability compensation at $67.21 per week or $2,755.61 plus 155.43 weeks permanent partial compenation at $74.79 per week in the sum of $11,624.61 for a total due and owing of $16,006.22 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $15,898.11 shall be paid at $74.79 per week for 212.57 weeks or until further order of the Director.

FURTHER AWARD IS MADE that claimant is entitled to reasonable and related expense for medical treatment from January 30, 1990, and unauthorized medical expense, if any, up to the statutory maximum of $350.00.

The six weeks of temporary total disability and medical expense related to the hernia condition shall be paid by Travelers Insurance Company. The rest and remainder of this award shall be the responsibility of the Kansas Workers Compensation Fund.

Future medical will be considered upon proper application to the Director.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with Mark S. Gunnison, his counsel, is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund and such is directed to pay costs of the transcripts as follows:

OWENS, BRAKE & ASSOCIATES

Deposition of Mark Schukman, Dated October 26, 1992		$ 352.10
Regular Hearing Transcript, Dated April 15, 1993		$ 413.50
	Total	$ 765.60

UNDERWOOD AND SHANE

Deposition of Dr. C. Reiff Brown, Dated September 28, 1992		$ 353.00

DON K. SMITH & ASSOCIATES

Deposition of Dr. Lary Hill, Dated September 14, 1992		$ 539.50
Deposition of Dr. Kenneth Hollis, Dated October 26, 1992		$ 250.00
	Total	$ 789.50

Docket No. 159,107

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY ENTERED IN FAVOR of the claimant, Lawrence Espinosa, and against the respondent, National Co-op Refinery Association, and the insurance carrier, American International Adjusting Company.

Claimant is entitled to 6.86 weeks temporary total compensation at $263.00 per week in the sum of $1,804.18 which as of this date would be due and owing to the claimant and which is ordered paid in one lump sum less any amounts previously paid.

FURTHER AWARD IS MADE that claimant is entitled to authorized medical expense incurred by claimant during the period of January 5, 1989, through March 3, 1989, and unauthorized medical expense, if any, up to the statutory maximum of $350.00.

Pursuant to K.S.A. 44-536, the claimant's contract of employment with Mark S. Gunnison, his counsel, is hereby approved.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the Kansas Workers Compensation Fund and such is directed to pay costs of the transcripts as itemized above.

IT IS SO ORDERED.

Dated this ____ day of December, 1993.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

The undersigned Appeal Board Members are in accord with majority opinion in this case as such opinion relates to the amount of workers compensation benefits awarded to the claimant. However, we disagree with the portion of the majority's opinion that finds that claimant filed a timely written claim for compensation pursuant to K.S.A. 44-520a, concerning claimant's first accident of January 5, 1989, in Docket No. 159,107.

At the regular hearing which was held in this matter, four exhibits were offered by the claimant as proof that a written claim was filed without an objection from the respondent. Exhibit No. 1 is labeled NCRA Preliminary Accident Report; Exhibit No. 2 is an Absentee Report; Exhibit No. 3 is a Claim for Workers Compensation for the January 5, 1989, accident; and Exhibit No. 4 is a Claim for Compensation Receipt, signed as received by the respondent on October 16, 1990.

The claimant identified Exhibit No. 1, Preliminary Accident Report, as a report concerning his accident of January 5, 1989. He went on to testify that the accident report identified where the accident happened, a description of how he was injured and the doctor the respondent referred him to for treatment. He further testified that it was a normal procedure for the respondent to fill out an accident report when someone was hurt at work and for the employee to sign such report. On cross examination by the respondent, the claimant agreed he had filled out a Claim for Workers Compensation Benefits in October, 1990, for the January 5, 1989 injury.

The claimant received authorized medical treatment for his injury from January 6, 1989, until March 3, 1989. Respondent also paid him 6.86 weeks of temporary total benefits. The claimant returned to his regular job on March 6, 1989. He then sustained another injury to his low back on January 30, 1990. He subsequently sought medical treatment for this re-injury on February 14, 1990. The claimant's condition remained constant and he sought no medical care during the period March 6, 1989, to January 30, 1990.

Whether an instrument propounded as a written claim or whether a claim for compensation has been filed in time is primarily a question of fact. Ours v. Lackey, 213 Kan. 72, 78, 515 P.2d 1071 (1973). What constitutes a written claim is governed by the intentions of the parties. Fitzwater v. Boeing Airplane Company Co., 181 Kan. 158, 166, 309 P.2d, 681 (1957).

The majority cites Ours v. Lackey, supra, as standing for the rule that written claim need not take a particular form so long as it is a claim. We agree that this is the rule that was announced by the Kansas Supreme Court in that case. However, the Court also looked at the actions of the employer and its insurance carrier in refusing compensation to the claimant. In Ours v. Lackey, the employer wrote many letters and had numerous contacts with the claimant in an effort to obtain compensation for his injury.

The majority also cites the case of Pyeatt v. Roadway Express, Inc., 243 Kan. 200, 76 P.2d, 438 (1988), in concluding that a timely written claim was filed in this case. Again, Pyeatt v. Roadway Express, Inc., is a case that the facts are entirely different than the case at hand. In Pyeatt, the respondent at the regular hearing raised the issue of timely written claim for a second accident. Prior to the regular hearing, three preliminary hearings were held where both dates of accidents were offered and medical and temporary total benefits were awarded for both accident dates. The Court held that, though the claimant failed to amend its original claim, the respondent had sufficient notice of both accidents and sufficient knowledge that the claim for compensation was based on both accidents.

In this particular case, there is absolutely no evidence that the employers report of accident and absentee report stand for anything other than what the documents are entitled on their face.

The employers report of accident satisfies the requirements of K.S.A. 44-520, i.e., Notice of Injury. The absentee report is simply an internal document used to report the absence of an employee from work.

The testimony of the claimant as set forth above does not sustain the claimant's burden that it was his "intention" when he signed the Preliminary Accident Report to claim compensation or maintain proceedings for compensation against the employer as required by K.S.A. 44-520a. In addition, there is absolutely no evidence in the record that the employer intended that the report signed by the claimant was a written claim for compensation as required by K.S.A. 44-520a.

The Courts over the years have liberally construed the written claim statute in favor of the worker. However, K.S.A. 44-501(g) was amended in 1990, eliminating liberal construction of the workers compensation act. The employer should be able to rely on such legislative intent unless the facts and circumstances of each individual case determines that the intent and actions of the parties satisfy the requirements of K.S.A. 44-520a.

The majority opinion discusses whether this incident constitutes one injury or two separate injuries in 1989 and 1990. The testimony of the claimant clearly supports a second injury on January 30, 1990. While the majority does not want to impose upon the claimant the responsibility of determining which injury date caused him to need medical care in February, 1990, the evidence clearly shows claimant's aggravation on January 30, 1990, was the precipitating factor leading to the February, 1990 treatment.

Claimant returned to his regular occupation after the injury on January 6, 1989, and continued to perform same, with accommodation, without need for medical care or treatment. The fact that he suffered a new and distinct injury on January 30, 1990, would not extend the written claim time under K.S.A. 44-520a for the earlier injury.

Taking into consideration the facts and circumstances of this particular case, the evidence simply does not prove that a timely written claim was filed by the claimant concerning his January 5, 1989 accident.

BOARD MEMBER

BOARD MEMBER

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